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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

NATIONAL TPS ALLIANCE, *et al.*,

Plaintiff,

v.

KRISTI NOEM, in her official capacity as
Secretary of Homeland Security, *et al.*,

Defendants.

Case No. 3:25-cv-1766-EMC

Hon. Sallie Kim

DEFENDANTS' RESPONSE TO PLAINTIFFS'
DISCOVERY LETTER BRIEF RE: SUBJECT
MATTER WAIVER OF ATTORNEY CLIENT
PRIVILEGE

1 Defendants write in response to Plaintiffs' assertion that the government has waived attorney-
2 client privilege over certain subject matter based on the production of a document that was inadvertently
3 labeled as attorney-client privileged.

4 At the core of this issue is Exhibit 1, bates stamped NTPSA2_001265-002, which is attached to
5 Defendants' Opposition to Plaintiffs Motion for Summary Judgment. That document, from 2023, contains
6 a banner that reads both "deliberative" and "attorney-client privileged." However, when Defendants
7 reviewed the document and logged it on the privilege log, Defendants withheld it solely on the basis of
8 deliberative process privilege. What Defendants did not do is strike through the confusing and mistaken
9 "attorney-client privileged" header on the document itself.

10 On June 6, 2025, this Court ordered Defendants "to produce documents for which Defendants
11 claim only the deliberate process privilege by June 13, 2025." ECF No. 184. On June 13, 2025, Defendants
12 complied with this Court's Order and produced all documents previously withheld based on only the
13 deliberate process privilege. This included NTPSA2_001265-002. On June 17, 2025, Defendants filed an
14 Opposition to Plaintiffs' Motion for Partial Summary Judgment and Cross-Motion for Summary
15 Judgment. ECF No. 199. In support of this motion, Defendants attached Exhibit 1, NTPSA2_001265-002.
16 ECF No. 199-2. As noted above, Exhibit 1 was originally withheld solely on the basis of deliberate process
17 privilege, and was disclosed following this Court's June 13, 2025 order. Noting the header, on June 18,
18 2025, Plaintiffs inquired as to why Defendants produced Exhibit 1 when it had a banner on the top of the
19 document that indicated it was attorney-client privileged. Upon review, Defendants informed Plaintiffs
20 that the header improperly included a marking for attorney-client privilege but that it was, as Defendants
21 had noted in the log, only protected by the deliberate process privilege because no attorneys were involved
22 in the comments or drafting of the document.

23 Plaintiffs now assert that Defendants have waived privilege over all of the duplicate documents
24 and, more expansively, all 2025 emails to which this document was attached, even if those emails involved
25 attorney correspondence and discussions separately protected by privilege. Plaintiffs incorrectly assert
26 that Defendants have selectively waived the attorney-client privilege in order to gain a litigation
27 advantage—when Defendants did no such thing, having always maintained NTPSA2_001265-002 was
28 withheld on the basis of deliberative process privilege alone.

1 To the extent that Defendants have incorrectly coded duplicates of Exhibit 1 as protected by
2 attorney-client privilege because those duplicates were attached to attorney-client privileged
3 correspondence, Plaintiffs argument that they are entitled to the other duplicate copies of this document
4 has merit. The document, as Defendants explained, is protected by deliberative process privilege only,
5 else NTPSA2_001265-002 would have never been produced to Plaintiffs pursuant to this Court's June 6,
6 2025 order to produce all documents withheld under the deliberative process privilege only. But an
7 inaccurate or mistaken coding of duplicates of a document as privileged based upon an inaccurate header
8 in the document, and subsequent acknowledgment of that mistake, is not the same as a party selectively
9 waiving a privilege in order to gain an advantage. The isolated, unintentional coding errors with regard to
10 this document from 2023 do not constitute a waiver of attorney-client privilege, even if that document
11 (and its duplicates) were attached to clearly privileged attorney-client communications in 2025.

12 Further, Defendants cannot waive a privilege that never existed. *See Koumoulis v. Independent*
13 *Financial Marketing Group, Inc.*, 295 F.R.D. 28, 48 (E.D.N.Y. Nov. 1, 2013)
14 ("Defendants cannot waive a privilege that never existed."); *see also Federal Election Com'n v. Christian*
15 *Coalition*, 178 F.R.D. 61, 71 (E.D. Va. Jan. 20, 1998) ("subject matter waiver is appropriate only when
16 the party seeking the privilege previously waived the attorney-client privilege to make some tactical use
17 of the documentation. When the party simply relates the communication to a third person, and does not
18 try to use the documentation to its advantage in litigation, then a court's finding subject matter waiver
19 would be an error of law.").

20 Here, Defendants asserted that NTPSA2_001265-002 was only protected by deliberative process
21 privilege and only disclosed it after having been ordered to by this Court. Plaintiffs attempt to construe
22 the disclosure as subject matter waiver is unavailing as "a party does not waive the attorney-client privilege
23 for documents which he is compelled to produce." *Transamerica Computer v. International Business*
24 *Machines*, 573 F.2d 646, 651 (9th Cir.1978). In determining whether the privilege should be deemed to
25 be waived, the circumstances surrounding the disclosure are to be considered. *Id.* at 652 (inadvertent
26 production of certain documents in accelerated discovery proceedings did not waive right to claim that
27 those documents were privileged); *United States v. Zolin*, 809 F.2d 1411, 1415 (9th Cir.1987), *aff'd in*
28 *part and vacated in part*, 491 U.S. 554 (1989). Furthermore, courts have routinely held that "disclosure of

1 information resulting in the waiver of the attorney-client privilege constitutes waiver ‘only as to
2 communications about the matter actually disclosed.’” *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156,
3 1162 (9th Cir. 1992) (quoting *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d
4 18, 25 (9th Cir. 1981) (“The district court correctly ruled that waiver with respect to information disclosed
5 did not constitute waiver as to all communications concerning” the more general subject matter.)); *see*
6 *Phoenix Solutions Inc. v. Wells Fargo Bank*, N.A. 254 F.R.D. 568, 576 (N.D. Cal. Oct. 22, 2008) (““There
7 is no bright line test for determining what constitutes the subject matter of a waiver, rather courts weigh
8 the circumstances of the disclosure, the nature of the legal advice sought and the prejudice to the parties
9 of permitting or prohibiting further disclosures.””) (quoting *Stanford v. Roche*, 237 F.R.D. 618, 625
10 (N.D.Cal.2006) (Patel, J.). Here, at most, Plaintiffs would be entitled to the other duplicate versions of
11 NTPSA2_001265-002.

12 But Plaintiffs seek far more, as they don’t really want the other copies of NTPSA2_001265-002.
13 What they want instead are all attorney-client communications that address the document, which reflect
14 some of the operational complications caused by Secretary Mayorkas’ 2023 re-designation of TPS for
15 Venezuela while the 2021 designation was concurrently in effect. Defendants would be highly prejudiced
16 by any order broadly waiving attorney-client privilege over the subject matter within the 2023 document
17 NTPSA2_001265-002. As noted, the 2025 email chains Plaintiffs seek include correspondence between
18 attorneys about the impact of the 2023 Venezuela TPS re-designation. Discussions between attorneys and
19 their clients about these complications and their legal policy options, are exactly the types of
20 communications that are protected by attorney-client privilege. Applying Plaintiffs expansive theory of
21 subject matter waiver, the privilege would cease to exist entirely. And following such a path is contrary
22 to the purpose behind the concept of subject matter waiver, which should be narrowly construed. *See*
23 *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (“[T]he doctrine of subject matter waiver is
24 narrowly construed and should only be employed when unfairness (i.e., tactical or strategic advantage) is
25 implicated-otherwise, the doctrine of subject matter waiver serves no useful purpose.”). This is especially
26 so when the production of a document was pursuant to a court order directing disclosure.

1 Accordingly, the Court should find that Defendants have not waived the attorney-client privilege
2 over any documents covered by the privilege or the subject matter contained within NTPSA2_001265-
3 002.

4 Dated: June 24, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2025, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all counsel of record.

/s/ Anna Dichter
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